Filed 4/10/19 P. v. Ackerman CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ISRAEL ACKERMAN, Defendant and Appellant.	D073260 (Super. Ct. No. SCD271741)

APPEAL from a judgment of the Superior Court of San Diego County, Amalia L. Meza, Judge. Affirmed in part, reversed in part, and remanded with directions.

Dacia A. Burz, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Kristen Ramirez, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Israel Ackerman of attempted voluntary manslaughter as a lesser included offense of attempted murder (Pen. Code,[1] §§ 664, 192, subd. (a), count 1), making a criminal threat (§ 422, count 2), and assault with a deadly weapon (§ 245, subd. (a)(1), count 3). On counts 1 and 3, the jury found true certain knife and great bodily injury enhancements. On count 2 (criminal threat), the jury found it was not true that Ackerman used a knife. Outside the jury's presence, Ackerman admitted suffering (1) two probation denial priors (§ 1203, subd. (e)(4)); (2) a prison prior (§ 667.5, subd. (b); (3) a serious felony prior (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)); and (4) a strike prior (§§ 667, subd. (b)-(i), 668, 1170.12). The court sentenced Ackerman to an aggregate term of 20 years in prison, which included a five-year consecutive term for the serious felony prior.[2]

On appeal, Ackerman contends that the court erroneously (1) excluded impeachment evidence of a witness's drug use, (2) failed to give a unanimity instruction on count 2, and (3) imposed the upper term on count 1. In supplemental briefing, Ackerman contends he is eligible for resentencing under Senate Bill No. 1393, effective January 1, 2019, which gives the trial court discretion to dismiss the five-year prior serious felony enhancement. The Attorney General concedes that remand is appropriate to allow the trial court to exercise this discretion.

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1 Undesignated statutory references are to the Penal Code.

2 The court ordered the four-year prison term on count 2 to run concurrently with the 11-year term on count 1.

We reverse Ackerman's conviction on count 2 because the court failed to give a required unanimity instruction. We also agree with the parties that Senate Bill No. 1393 applies. We reject Ackerman's other claims of error.

FACTUAL BACKGROUND

A. *The People's Case*

Anthony K.'s family owns a liquor store and two apartments above the store. Stairs from the parking lot lead to the apartments.

In April 2017 Anthony was renovating the vacant apartments. His friend, Bianca, came by to see him. At the same time, Ackerman parked in front of the liquor store. Bianca and Ackerman knew each other. They spoke briefly in the parking lot. Ackerman told Bianca he was having domestic problems. After they exchanged phone numbers, Bianca went upstairs to the apartment and Ackerman drove away.

About 30 minutes later, Ackerman returned. Anthony, who did not know Ackerman, told Bianca, "I think your friend is here."

Bianca was surprised that Ackerman returned. She did not know why he came back, had not asked him to return, and specifically denied that he returned to buy drugs from her. Anthony thought that Ackerman returned because Bianca "is a pretty girl." Hoping that Ackerman would just leave, Anthony told Bianca to remain in the apartment.

Ackerman tried to get Bianca's attention by honking his truck's horn and whistling. When that did not work, he called Bianca's phone. When she did not answer he texted, "What the fuck, I'm waiting outside."

When Bianca did not come downstairs, Ackerman went upstairs. When Anthony told him to leave, the men argued. Their yelling was so loud and angry, a neighbor recorded it because she feared "something was going to happen." The audio recording was played for the jury. Ackerman left the parking lot yelling, "I know where you live. I'll be back."

Bianca felt badly that the men had argued and knew Ackerman was having family problems. She texted him, "I'm sorry, I'm so fucking sorry."

Fearing that Ackerman would return, Anthony watched the stairway while continuing to work in the apartment. About 20 minutes later, Ackerman returned. But this time, he did not come up the stairs. Instead, he used a ladder to climb up onto the second floor patio. Ackerman barged through the apartment's door holding a knife. Making stabbing motions at Anthony, Ackerman said, "What's up now, motherfucker."

Ackerman ran into the apartment so fast, Bianca could barely get out of the way. Anthony was shocked to see Ackerman because he was watching the stairwell and did not see him come up the stairs.

Anthony grabbed a long-handled paint scraper and hit Ackerman. Ackerman stabbed Anthony four times in the arm and leg. Ackerman, who outweighs Anthony by 30 pounds, pushed him against a window. Bianca was screaming, "Stop, stop it."

Anthony fell on glass and blacked out. When he regained consciousness, he saw that Ackerman was also unconscious. While Ackerman was out cold, Anthony punched

him in the face and pepper sprayed his eyes "in case he waked up [*sic*] so he can't come after anybody . . . ."[3]

Anthony was bleeding profusely; Bianca thought he was going to die. Anthony picked up the knife and tried to give it to Bianca. But she refused to hold it, so Anthony left the knife in the stairwell.

Anthony and Bianca walked across the street to a fire station, where paramedics attended him and called an ambulance. One stab wound near the femoral artery could have caused a life-threatening loss of blood had it been struck.

Police arrested Ackerman inside the apartment. Ackerman had a fractured nose and multiple facial fractures.

Police recovered a bloody knife with a four-inch dual blade at the top of the stairs. The blade had a paint-like substance on it. Police were unable to recover any fingerprints from the knife. However, DNA analysis showed that Anthony's blood alone was on the blade and the bloody parts of the handle. On an area of the handle with no apparent blood, 98 percent of the DNA was Anthony's and two percent was Ackerman's. The police criminalist explained that faint amounts of blood invisible to the naked eye probably accounted for the prevalence of Anthony's DNA on the seemingly bloodless part of the handle.

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[3] Anthony had the pepper spray in his pocket, but Ackerman came at him so fast, he did not have time to use it earlier.

B. *Defense Case*

Alicia, Ackerman's girlfriend, accompanied him to the liquor store. She was seven months pregnant and waited in the truck. She testified that Ackerman was not angry and never mentioned planning to assault or try to kill anyone.[4]

A defense-retained criminalist supported Ackerman's theory that the knife belonged to Anthony. He testified that the knife's owner should be the predominant source of DNA on the bloodless part of the handle. Moreover, the person who owned the knife "and used it over and over" should be the dominant DNA profile. The defense expert disagreed with the police criminalist's opinion that faint amounts of blood accounted for Anthony's DNA on the apparently bloodless part of the knife handle. He explained that the test the police criminalist used on the handle that indicated there was no blood there is highly accurate. He also testified that if Anthony merely picked up the knife and then dropped it, one would not expect his DNA to overwhelm at 98 percent. The defense expert stated there was insufficient data to conclude that the two percent DNA on the knife handle was Ackerman's.

Ackerman did not testify. A physician who treated him at the hospital testified that Ackerman tested positive for methamphetamine and alcohol.

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4 This was elicited on cross-examination during the People's case. Also, by stipulation, Anthony was impeached with prior convictions for receiving stolen property, felony grand theft, and possessing a stolen vehicle.

C. *Closing Arguments*

The prosecutor argued that Ackerman came "sneaking up for no other reason that is fathomable except to gain a tactical advantage to take [Anthony] by surprise . . . with this weapon in his hand" and "try and kill" him.

Defense counsel argued, "This is a drug deal gone bad" and "Ackerman didn't intend to kill anyone." Counsel asserted that Ackerman entered the apartment unarmed, the knife belonged to Anthony, and Ackerman "had no choice but to act in self-defense."

DISCUSSION

I. *THE COURT DID NOT ABUSE ITS DISCRETION IN PRECLUDING COLLATERAL IMPEACHMENT OF DRUG USE*

A. *Additional Background*

During cross-examination, Bianca answered defense counsel as follows:

> "Q: . . . Now, when you got Mr. Ackerman's phone number . . . before he left did you and Mr. Ackerman agree on anything?
>
> "A: No.
>
> "Q: Did you at any point agree to sell Mr. Ackerman drugs?
>
> "A: To do what?
>
> "Q: To sell Mr. Ackerman drugs?
>
> "A: I have no—I have nothing in—why would I sell any type of drugs to anybody? I don't even—
>
> "Q: *Well, isn't it true,* [*Bianca*]*, that you at least at the time of the incident, you have used drugs before, right?*
>
> "A: *No, I have not.*
>
> *"*[Prosecutor]*: Objection. Relevance, Your Honor.*

"The Court: *Overruled.*

"Q: *It's your testimony—*

"A: *I have not used drugs before. I have not.*

"Q: [*Bianca*], *isn't it true that you currently from April 22, 2017 right before this—*

"[Prosecutor]: Your Honor, could we go side-bar?

"The Court: Yes." (Italics added.)

At side bar, defense counsel stated she wanted to impeach Bianca with an arrest for possessing a controlled substance. After the court reporter read back the testimony italicized above, the court stated, "She just answered that she didn't have an agreement. I thought that maybe she had volunteered 'I've never used drugs' so then I thought okay, then you can ask her questions, but she hasn't said that, and so I don't think it's appropriate to ask her." The court added, "You can't impeach her with it. It's not like she volunteered something that you can go after. You have broached the subject about whether she agreed to sell the defendant drugs. She said no. And now you're getting into whether she uses drugs. [¶] . . . That's not appropriate impeachment."

After further discussion between the court and counsel, the court again explained, "[T]here's no foundation to ask her about drug use. That's not a permissible area of impeachment. She has not volunteered that she does not use drugs, so right now you cannot ask that question." Defense counsel responded:

"I'm just saying I'm asking for an opportunity so she can be impeached. I know she's going to deny that she has any—any involvement with drugs whatsoever, and we know for a fact that

> that's not true. I understand that she has to say first[, ']I did not—[]I've never possessed them, never used them,' but I'm asking from—Your Honor to allow me to ask one question which is: [H]ave you used drugs prior to this incident? And if she says yes, then, of course, I can't keep going with impeachment, but if she says no, we know for a fact that that's not true, then I can impeach her."

The court denied this request stating, "That's not a permissible area of inquiry to impeach a witness, not with this record . . . ."

Later, during Ackerman's case-in-chief, the jury sent a pre-deliberation note to the court stating, "[W]hat was so urgent for [Ackerman] to want to speak with [Bianca]? (Motive)"

Based on this note, defense counsel asked the court to allow her to recall Bianca. Defense counsel stated she wanted to ask Bianca, "'Well, have you ever possessed or used drugs?' And if she says, 'Yes,' that's great, I can't bring up the . . . open [possession] case. If she says, 'No, I've never possessed or used drugs,' I get to impeach her, and if she's—if I ask her, 'Have you ever sold drugs or bought drugs,' and she says, 'No,' I can also impeach her with text messages that we have. There are text messages between her and another individual where she's buying drugs." Defense counsel argued that by prohibiting her from asking these questions, Ackerman was deprived from "being able to fully argue to the jury . . . there is no attempt to kill but this is simply for him to go get his drugs."

Denying this request, the court again ruled that "asking a witness have you ever possessed or used drugs is not a permissible line of questioning." Additionally, stating

that the evidence was inadmissible under Evidence Code section 352, the court explained:

> "[Y]ou say you need to ask her this question in order to somehow argue that this was a drug deal. There is no evidence of a drug deal between them, and trying to get in text messages with other people? *That is collateral under* [*Evidence Code*] *352*. That would only confuse the jury and would take them down a road that has nothing to do with this case. She said she didn't sell him—did not have an agreement to sell him drugs. You got her to answer those questions, but getting into questions about whether she has ever possessed or used drugs, [is] not allowed. And I explained to the jurors CALCRIM [No.] 106 the following with regard to asking questions: 'Do not feel slighted or disappointed if your question is not asked. Your question may not be asked for a variety of reasons including the reason that the question may call for an answer that is inadmissible for legal reasons.'" (Italics added.)

B. *Ackerman's Contention*

Ackerman contends that the court erred in excluding impeaching evidence of Bianca's drug use or possession because on-cross examination, Bianca "volunteered the sweeping assertion that 'I have no—I have nothing—why would I sell any type of drugs to anybody.'" Ackerman states that by this answer, Bianca "portrayed herself as a person who had . . . nothing to do with drugs." Further, Ackerman asserts that impeaching this testimony was "fundamental to the defense theory" because the excluded evidence "tended to show that [Bianca] agreed to sell [Ackerman] drugs, and as a result, [Ackerman] was motivated to go back to the apartment . . . to get drugs from [Bianca] rather than revenge against [Anthony] due to their earlier confrontation."

C. *Analysis*

1. *The court did not abuse its discretion in precluding impeachment on a collateral matter*

"Evidence of a witness's drug use is inadmissible unless the testimony 'tends to show that the witness was under the influence thereof either (1) while testifying, or (2) when the facts to which he testified occurred, or (3) that his [or her] mental faculties were impaired by the use of such narcotics.'" (*People v. Panah* (2005) 35 Cal.4th 395, 478 [no error in excluding evidence that the witness had smoked marijuana with the defendant].)[5]

These foundational prerequisites were not met here. Defense counsel did not ask Bianca whether she was impaired or ask any of the police officers who testified if they observed any signs of impairment. There is nothing in the record that as a result of drug use, Bianca misperceived or misremembered the events. Moreover, evidence that Bianca used or possessed drugs does not contradict Bianca's testimony that she had no agreement to *sell* drugs to Ackerman. Thus, defense counsel was seeking to offer evidence of collateral impeaching facts. (*People v. Contreras* (2013) 58 Cal.4th 123, 152 ["a matter is 'collateral' if it has no logical bearing on any material, disputed issue"].)

"[C]ollateral matters are admissible for impeachment purposes . . . ." (*People v. Lavergne* (1971) 4 Cal.3d 735, 742 (*Lavergne*).) However, "the collateral character of the evidence reduces its probative value." (*Ibid*.) Therefore, when a party seeks to impeach a witness on a collateral matter, a trial court must determine whether the

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5 Moreover, simple possession of drugs does not generally involve moral turpitude for impeachment purposes. (*People v. Vera* (1999) 69 Cal.App.4th 1100, 1103.)

probative value of the evidence is substantially outweighed by the likelihood that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issue, or of misleading the jury. (Evid. Code, § 352.)

Trial courts have broad discretionary powers "to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*People v. Wheeler* (1992) 4 Cal.4th 284, 296, superseded by statute on other grounds as stated in *People v. Duran* (2002) 97 Cal.App.4th 1448, 1460; see, e.g., *People v. Rodriguez* (1999) 20 Cal.4th 1, 9 [witness who saw the murder from his apartment building room could not be impeached with evidence disputing his claim that he had management's permission to be there].) "Because the court's discretion to admit or exclude impeachment evidence 'is as broad as necessary to deal with the great variety of factual situations in which the issue arises' [citation], a reviewing court ordinarily will uphold the trial court's exercise of discretion." (*People v. Clark* (2011) 52 Cal.4th 856, 932.)

The trial court did not abuse its discretion in precluding defense counsel from eliciting evidence of Bianca's drug use and seeking to impeach any denial. Evidence of Bianca's drug use would have amounted to impeachment on a collateral matter and raised the concerns of holding a trial within a trial. As the trial court aptly noted, "There is no evidence of a drug deal between them," and text messages between Bianca and other people about using drugs "would only confuse the jury and would take them down a road that has nothing to do with this case."

Moreover, it is improper to elicit otherwise irrelevant testimony on cross-examination merely for the purpose of contradicting it. (*Lavergne, supra*, 4 Cal.3d at p.

744 ["A party may not cross-examine a witness upon collateral matters for the purpose of eliciting something to be contradicted."].) The trial court's ruling is correct for this additional reason because defense counsel conceded that she cross-examined Bianca about drug use "so she can be impeached." Counsel's aim was not to establish that Bianca is a drug *user*, but rather that the jury should disbelieve her testimony that she did not agree to *sell* drugs to Ackerman. Defense counsel told the court, "I know she's going to deny that she has any—any involvement with drugs whatsoever, and we know for a fact that that's not true. I understand that she has to say first, I did not—'I've never possessed them, never used them,' but I'm asking from—Your Honor to allow me to ask one question which is: have you used drugs prior to this incident? And if she says yes, then, of course, I can't keep going with impeachment, but if she says no, we know for a fact that that's not true, then I can impeach her."

2. *The exception for volunteering does not apply*

The rule generally prohibiting impeachment on collateral matters does not apply when the witness volunteers irrelevant information. "A witness who makes a sweeping statement on direct or cross-examination may open the door to use of otherwise inadmissible evidence of prior misconduct for the purpose of contradicting such testimony." (*Andrews v. City and County of San Francisco* (1988) 205 Cal.App.3d 938, 946 (*Andrews*).) Invoking this rule, Ackerman asserts that Bianca "volunteered the sweeping assertion" that she had no involvement with drugs, and thus opened the door to evidence impeaching that testimony.

In determining whether Bianca's testimony opened the door to impeachment evidence of her drug use, it is helpful to examine similar cases involving sweeping denials. For example, in *People v. Reyes* (1976) 62 Cal.App.3d 53 (*Reyes*), a defendant charged with bookmaking was asked on direct if he had engaged in any type of betting or bookmaking on the day of his arrest. He responded, "'No. Absolutely not,'" and further denied ever engaging in any betting or bookmaking, stating, "I am not a bookmaker. I work for a living." (*Id.* at p. 60.) On cross, he could be impeached with an otherwise inadmissible misdemeanor conviction for bookmaking because of his "'sweeping' denial . . . of ever having engaged in bookmaking . . . ." (*Id.* at p. 61, italics omitted.) In *People v. Cooks* (1983) 141 Cal.App.3d 224 (*Cooks*), the defendant testified that he had never possessed a gun. The prosecution was allowed to impeach by introducing evidence that the defendant had previously pleaded guilty to misdemeanor possession of a stolen handgun. (*Id.* at p. 324.) Likewise, in *People v. Gardner* (1975) 52 Cal.App.3d 559, disapproved on other grounds in *People v. Wheeler* (1978) 22 Cal.3d 258, 286, fn. 35), after the defendant volunteered "I never threatened anybody," the prosecution was allowed to impeach with a prior conviction for manslaughter in which he had used his fists as weapons. (*Id.* at pp. 560-562; see also *People v. Senior* (1992) 3 Cal.App.4th 765, 778 [defendant not only denied threatening to kill his wife, but categorically denied ever threatening anyone; rebuttal testimony concerning other threats was proper]; *Andrews*, *supra*, 205 Cal.App.3d 938 at pp. 945-947 [police officer sued for using excessive force testified that he exercised restraint in bookings; rebuttal testimony from four persons he injured while in custody was proper].)

Here, defense counsel asked Bianca, "Did you at any point agree to sell Mr. Ackerman drugs?" Bianca answered: "I have no—I having nothing in—why would I sell any type of drugs to anybody? I don't even—" Ackerman contends that by this answer, Bianca "volunteered" a "sweeping assertion" that "portrayed herself as a person who had no reason to sell drugs to anybody because she had nothing to do with drugs."

We disagree. Bianca's answered in sentence fragments: "I have no—," "I have nothing in—," and "I don't even—." These fragments are meaningless because they are incomplete. We can only speculate what would have come after "I have no—" and the other two incomplete sentences. To the extent Bianca's rhetorical question, "Why would I sell any type of drugs to anybody," is an answer, it is not a sweeping assertion that she does not *use* drugs, but can only be reasonably interpreted in light of the question counsel asked to mean she does not *sell* drugs.

Accordingly, Bianca did not open the door to impeachment evidence regarding her drug use. The trial court correctly stated, "It's not like she volunteered something you can go after [her] on" and "[s]he has not volunteered that she does not use drugs, so right now you cannot ask that question." Unlike the witnesses in *Reyes*, *supra*, 62 Cal.App.3d 53 and *Cooks*, *supra*, 141 Cal.App.3d 224, Bianca did not volunteer a sweeping claim that collateral evidence of her drug use or possession would contradict.

3. *No federal constitutional violation*

Ackerman contends the exclusion of impeachment evidence violated his right to confrontation, to present a defense, and to due process under the California and United States Constitutions. "'[T]he right of confrontation and cross-examination is an essential

and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, . . . to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.'" (*People v. Brown* (2003) 31 Cal.4th 518, 538 (*Brown*).) "'The constitutional right of confrontation includes the right to cross-examine adverse witnesses on matters reflecting on their credibility.'" (*People v. Ardoin* (2011) 196 Cal.App.4th 102, 118 (*Ardoin*).)

However, "'The right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal process.'" (*Brown*, *supra*, 31 Cal.4th at p. 538.) "'[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent the defense might wish.'" (*People v. Morse* (1992) 2 Cal.App.4th 620, 642.)

"'[T]he accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" (*People v. Ayala* (2000) 23 Cal.4th 225, 269.) """[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues . . . ." [Citations.] Exclusion of impeaching evidence on collateral matters which has only slight probative value on the issue of veracity does not infringe on the defendant's right of confrontation.'" (*Ardoin*, *supra*, 196 Cal.App.4th at p. 119.) "'[R]eliance on Evidence Code section 352 to exclude

evidence of marginal impeachment value that would entail the undue consumption of time generally does not contravene a defendant's constitutional rights to confrontation and cross-examination.'" (*Id.* at p. 122.)

Here, the trial court applied Evidence Code section 352 and determined the evidence would "only confuse the jury and would take them down a road that has nothing to do with this case." The court did not abuse its discretion and did not violate Ackerman's rights to confront and cross-examine Bianca. (*Brown*, *supra*, 31 Cal.4th at pp. 545-546; *Ardoin*, *supra*, 196 Cal.App.4th at p. 123; *People v. Jennings* (1991) 53 Cal.3d 334, 372 [when the evidence "would impeach [a] witness[] on collateral matters and [is] only slightly probative of [her] veracity, application of Evidence Code section 352 to exclude the evidence [does] not infringe defendant's constitutional right to confront the witnesses against him."]; *People v. Henriquez* (2017) 4 Cal.5th 1, 29 ['"The "routine application of state evidentiary law does not implicate [a] defendant's constitutional rights."'"].)

Citing *People v. Quartermain* (1997) 16 Cal.4th 600, Ackerman further contends that a trial court's limitation on cross-examination violates the confrontation clause if a reasonable jury might have received a "significantly different impression of the witness had the excluded cross-examination been permitted." However, as was the case in *Quartermain* at page 624, there was no confrontation clause violation here because the witness was substantially impeached with other evidence. On direct examination, Bianca testified that although she had known Anthony for two years, they were merely platonic friends then, and are not in any romantic relationship now. On cross-examination, Bianca

insisted that she and Anthony were "just friends" and denied telling a defense investigator that she and Anthony were dating. Bianca was impeached with prior inconsistent statements she made to the defense investigator that she was dating Anthony at the time of the incident and was living with him when interviewed. The defense also undercut Bianca's credibility by eliciting evidence that although Bianca witnessed the fight and stabbing, she left the scene quickly afterwards without giving any statement to the police.

Thus, the court allowed defense counsel to develop evidence demonstrating Bianca's bias and lack of credibility. In closing argument, defense counsel argued this precise point, telling the jury:

> "[Bianca's] credibility. Okay. You may be asking, where is [the defense] getting all this drug-related stuff? Okay. . . . She lied about her relationship with [Anthony]. Clearly they had talked before this. I mean they're dating. They're friends. You heard my investigator come up. I was there, the investigator was there. She asked her were you in a relationship with him. She was. She's—they're not telling the truth, and you ask why? Why are you not being truthful about that? Who cares if they're in a relationship? They want to avoid bias. Is that what it is?
>
> "But more importantly why is she avoiding the police? There was over fifteen officers on scene. . . . She left before the cops arrived. . . . Why is she avoiding the police. . . . "[¶] . . .
>
> "Why would a person who is so innocent and didn't do anything wrong whose boyfriend or friend, whatever you want to call it, just got stabbed almost to death would you not want to explain to the cops what happened? Could it be that you have drugs on you? Could it be that you have a guilty conscious [*sic*] because you had made an agreement with Mr. Ackerman to exchange for drugs? Maybe she's under the influence. I don't know. But there's something she's hiding. There is a reason why she's staying away from every single officer. She's the only witness that saw what happened but yet she didn't give one single statement. . . . She's hiding something. She's involved with this. She was selling drugs

> to Mr. Ackerman, but she didn't want to get caught and get in trouble. That's what this is about.
>
> "And not to mention we know she has a guilty conscious [*sic*], she texted, 'I'm so sorry.' That's evidence. That's not even contested. She texted him. Why would you text, oh, I'm so sorry. . . . The only reason she's texting him sorry is because she has a guilty conscious [*sic*]. She knows. She was involved with this. She knows. She could have came [*sic*] out the second time and given him the drugs that they agreed on. That's what this is about, but she can't go against [Anthony]."

Accordingly, the court did not violate Ackerman's confrontation rights by precluding defense counsel from impeaching Bianca on collateral matters.

II. *THE COURT ERRED IN FAILING TO GIVE A UNANIMITY INSTRUCTION ON COUNT 2—CRIMINAL THREAT*

A. *Additional Background*

The evidence showed that Ackerman made two threats. The first occurred after the initial heated argument between him and Anthony where Ackerman said, "I know where you live, I'll be back." The second occurred about 20 minutes later when Ackerman returned, entering the apartment wielding a knife and stating, "What's up now, mother fucker."

Outside the jury's presence, defense counsel asked the prosecutor to state the People's theory on this count. The prosecutor replied that the criminal threat occurred when Ackerman "comes through the door with the knife, he says 'What's up now?' or, 'What's up now, mother fucker?' with the knife." The prosecutor noted that count 2 contained a knife enhancement allegation, "And it is charged with a knife. The

allegation. So the theory is it's when he comes in the door." The prosecutor further stated that count 2 was *not* based on Ackerman's statement, "I'll be back to get you."

Consistent with these representations, in closing argument the prosecutor told the jury, "Count 2 is the criminal threat . . . and this is the statement he makes, 'What's up now?' when he comes through that door with the knife. . . . [¶] . . . [¶] What's up now?' Count 2, the defendant's also alleged with the personal use of a deadly weapon."

During deliberations, however, the jury sent a note asking, "For count #2—does the use of a deadly and dangerous weapon need to occur at the same time as the threat or can it occur minutes later or even up to 20 minutes later?" The clerk's minutes state that the bailiff "deliver[ed] the following agreed upon response: "You must determine whether the use of a deadly and dangerous weapon occurred during the commission of the criminal threat." On count 2, the jury returned a guilty verdict—but found "not true" the allegation that Ackerman used a knife in committing the offense.

B. *Ackerman's Contention*

Ackerman contends that a unanimity instruction was required unless the prosecutor made an election properly informing the jury which of the two statements constituted the threat. He asserts that the prosecutor failed to properly make an election, as evidenced by the jury note that showed at least one juror believed a conviction could rest on the first threat, the one made without a knife and about 20 minutes before Ackerman returned armed. Ackerman contends that because the prosecutor failed to make an effective election, the court erred in failing to sua sponte give a unanimity instruction.

C. *Analysis*

"[A] jury verdict must be unanimous" and "the jury must agree unanimously the defendant is guilty of a *specific* crime." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132). Accordingly, "When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act." (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534 (*Melhado*).) This prevents the jury from """amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count."""" (*People v. Hernandez* (2009) 180 Cal.App.4th 337, 347.) If no election is made, the court has a sua sponte duty to instruct on unanimity. (*Melhado*, at p. 1534.)

To make a valid election, the prosecutor must inform the jury of the specific act upon which the charge is based *and* inform the jury of its duty to arrive at a unanimous decision based upon that act. (*Melhado*, *supra*, 60 Cal.App.4th at p. 1539.) This is typically done in opening statement and/or closing argument. (*People v. Mayer* (2003) 108 Cal.App.4th 403, 418.) The prosecutor's election "must be made with as much clarity and directness as would a judge in giving instruction." (*Melhado*, at p. 1539.) "The record must show that by virtue of the prosecutor's statement, the jurors were informed of their duty to render a unanimous decision as to a particular unlawful act."

(*Ibid*.) Such an election removes the need for a unanimity instruction. (*People v. Mahoney* (2013) 220 Cal.App.4th 781, 796.)

The Attorney General contends that the prosecutor properly made an election by telling the jury in closing argument that count 2 "is the statement [Ackerman] makes—'What's up now?'—when he comes through that door with the knife."

However, while the prosecutor clearly directed jurors' attention to "[w]hat's up now," she did not also inform them of their duty to unanimously base the verdict *solely and exclusively* upon this statement. Nor did the jury instructions and verdict form make it clear that count 2 was solely based on "[w]hat's up" rather than "I'll be back."

The standard unanimity instruction, CALCRIM No. 3502, instructs that the jury may not find the defendant guilty unless the jurors agree on the specific act *and* further instructs that "[e]vidence that the defendant may have committed the alleged offense (on another day/[or] in another manner) is not sufficient for you to find him/her guilty of the offense charged." The prosecutor's statement here was not made with "as much clarity and directness as would a judge in giving instruction" (*Melhado, supra*, 60 Cal.App.4th at p. 1539) because the prosecutor did not tell the jurors they were precluded from returning a guilty verdict based on any statement other than "[w]hat's up now." (See *id.* at p. 1536.) Because the prosecutor did not clearly and directly communicate an exclusive election to the jury, the court erred in failing to instruct sua sponte on unanimity. (*Id.* at p. 1534.)

There is a split of opinion in the appellate courts as to whether the *Chapman*[6] standard or the *Watson*[7] standard for harmless error applies in a unanimity instruction case. (See, e.g., *People v. Matute* (2002) 103 Cal.App.4th 1437, 1448-1449 [noting conflicting authorities].) The majority of courts that have addressed the issue have applied *Chapman*. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 185-186 (*Wolfe*).) In *Wolfe*, the court explained that federal due process requires that the prosecution convince a jury of the defendant's guilt of the crime beyond a reasonable doubt. (*Id.* at pp. 186-188.) "When the trial court erroneously fails to give a unanimity instruction, it allows a conviction even if all 12 jurors . . . are not convinced that the defendant is guilty of any one criminal event . . . . This lowers the prosecution's burden of proof and therefore violates federal constitutional law." (*Id.* at pp. 187-188.) Because the error violates federal constitutional rights, the *Wolfe* court applied *Chapman*. (*Wolfe*, at p. 188.) We find that analysis persuasive and apply *Chapman*.

The court's failure to give a unanimity instruction was prejudicial. In light of evidence that the two threats were made 20 minutes apart, the jury note asking whether the threat could be separated by 20 minutes from the use of the knife strongly suggests that at least one juror believed the criminal threat was Ackerman's statement, "I know where you live. I'll be back." The court's response—"You must determine whether the

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6 *Chapman v. California* (1967) 386 U.S. 18.

7 *People v. Watson* (1956) 46 Cal.2d 818.

use of a deadly and dangerous weapon occurred during the commission of the criminal threat"—did not clarify that the jury could only consider the "[w]hat's up" threat.

Moreover, in finding Ackerman guilty of making a criminal threat, the jury also found the knife enhancement "not true." This means the jury may have based its verdict on the "I'll be back" threat, as there was no evidence that Ackerman was armed at that time.

Under the *Chapman* standard, we ask "'whether it can be determined, beyond a reasonable doubt, that the jury actually rested its verdict on evidence establishing the requisite [elements of the crime] independently of the force of the . . . misinstruction.'" (*Wolfe*, *supra*, 114 Cal.App.4th at p. 188.) In light of the evidence presented, the prosecutor's argument, the jury question and the court's response, and the "not true" finding on the knife allegation in count 2, we cannot conclude beyond a reasonable doubt that the jury unanimously agreed as to what constituted the single criminal threat charged. The error, therefore, is prejudicial and reversal is required on count 2.[8]

III. *THE COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING ACKERMAN TO THE UPPER TERM FOR ATTEMPTED VOLUNTARY MANSLAUGHTER*

A. *Additional Background*

At sentencing, the court imposed the upper term of 66 months on count 1, attempted voluntary manslaughter, doubled to 11 years because of the strike prior. Explaining its reasons for selecting the upper term, the court stated:

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8 In light of this disposition, it is unnecessary to consider Ackerman's alternative argument that the court erred in failing to give a unanimity instruction in response to the jury's question about whether the threat could occur 20 minutes before using the knife.

> "[Ackerman] climbs up the ladder, and he stages a surprise attack on the occupant of the house. Of the residence. And he barges in with a knife. That is really egregious behavior.
>
> " . . . Here the actions of Mr. Ackerman were vicious. They were cruel. And it could have resulted in [Anthony] getting killed, and there was a woman on the property with a baby who witnessed all of this. That's pretty bad. That's violent. That's conduct that is a threat to public safety.
>
> " . . . [Anthony] was severely injured. The jury came back that he suffered great bodily injury. There are pictures of his injuries that are horrible so I have to look at all of that . . . . [¶] . . .
>
> " . . . The court has selected the upper term because of the way the attack was carried out. As I indicated before, it was a sneak attack, and the victim's statements in the presentence report are that he constantly thinks about this. He remembers it as a scary movie, and he says he has become paranoid as a result.
>
> "The attack required planning and was not the result of a spontaneous reaction."

B. *Ackerman's Contention*

Ackerman contends the court improperly considered factors the jury had found not to be true when it convicted him of attempted voluntary manslaughter on an imperfect self-defense theory, instead of attempted murder. He concedes that "the trial court is not prohibited from making findings of fact that are inconsistent with a jury's verdict of acquittal on other counts." However, Ackerman contends this rule does not apply here because the conviction for attempted voluntary manslaughter on an imperfect self-defense theory constitutes findings that Anthony "provoked and/or escalated the fight" that "foreclosed" the trial court "from taking a contrary view of the evidence."

C. *Analysis*

"When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court." (§ 1170, subd. (b).) In determining the appropriate sentence term, the trial court considers factors in aggravation or mitigation, "and any other factor reasonably related to the sentencing decision." (Cal. Rules of Court,[9] rule 4.420(b).). "One aggravating factor is sufficient to support the imposition of an upper term." (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1371.) The factors in aggravation are to be established by a preponderance of the evidence. (*People v. Lewis* (1991) 229 Cal.App.3d 259, 264.)

A trial court's decision to impose an upper term is reviewed for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, "'[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.'" [Citation.] Second, a "'decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'" [Citation.] Taken together, these

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9 Citations to rules are to the California Rules of Court.

precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.)

Ackerman's argument fails for two reasons. First, the conviction for attempted voluntary manslaughter does not necessarily mean the jury believed the defense theory that Anthony attacked first with the knife. The verdict is also consistent with the jury finding that Ackerman entered with the knife and unreasonably believed he was in imminent danger of death or great bodily injury, or unreasonably believed the immediate use of force was necessary to defend himself. In closing argument, Ackerman's lawyer made this precise point, stating, "So even if we take [the People's] story as true that Mr. Ackerman is the one that was going in there, the fact that [Anthony] beat up Mr. Ackerman so badly that he was knocked unconscious and suffered fractures, there's no doubt at some point he's acting in self-defense. It may not have been reasonable, but if that's the case, you would be finding him not guilty of attempted murder and he would be found guilty of [attempted] voluntary manslaughter."

Second, Ackerman's argument is untenable because it is based on a fundamental misunderstanding of the verdict. The court instructed the jury on attempted voluntary manslaughter on an imperfect self-defense theory as a lesser included offense of attempted murder. The court further instructed: "*The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of attempted murder.*" (Italics added.)

Thus, the jury was not instructed to find Ackerman guilty of attempted voluntary manslaughter only if jurors affirmatively found that he *had* acted in imperfect self-defense—but rather that it must find him not guilty of attempted murder if the People had not met their burden to prove that he had *not* done so. The jury's verdict, therefore, does not imply a finding that Ackerman actually acted in imperfect self-defense, but only that his conduct was not justified (i.e., he did not act in self-defense) and that the People had not proved lack of imperfect self-defense beyond a reasonable doubt.

The California Supreme Court in *People v. Towne* (2008) 44 Cal.4th 63, 83-89 (*Towne*) considered a similar issue. There, the defendant there was charged with carjacking, kidnapping, second degree robbery, grand theft of an automobile, making criminal threats, kidnapping to commit carjacking, kidnapping to commit robbery and '"joyriding."' (*Id.*, at p. 72.) The jury convicted him of only joyriding. (*Id.* at p. 73.) The trial court sentenced him to the upper term based in part on its conclusion that the crime was aggravated because the victim was in fear for his life. (*Ibid.*) The defendant argued that the trial court abused its discretion in imposing the upper term, asserting, "[T]he trial court's reliance upon its own conclusion that the victim was put in fear is in direct conflict with the jury's decision to acquit defendant of all charges involving the element of force or fear." (*Id.* at pp. 83, 73.)

Rejecting this contention, the court in *Towne*, *supra*, 44 Cal.4th at page 85 held that the trial court has "broad discretion to consider relevant evidence at sentencing" and that "[n]othing in the applicable statute or rules suggests that a trial court must ignore evidence related to the offense of which the defendant was convicted, merely because

that evidence did not convince a jury that the defendant was guilty beyond a reasonable doubt of related offenses." (*Id.* at pp. 85-86.) The court concluded that the defendant had "received the benefit of the jury's acquittal, because the resulting sentence imposed by the trial court was limited to that available for the offense of joyriding. We perceive no unfairness in permitting the trial court, in selecting the sentence most appropriate for the crime, to take into account all of the evidence related to defendant's conduct in committing that offense." (*Id.* at pp. 88-89.)

Towne, supra, 44 Cal.4th 63 similarly applies here. The jury made no affirmative finding that Ackerman did not execute a sneak attack armed with a knife, but instead determined that the People had not carried their burden of negating imperfect self-defense beyond a reasonable doubt. Thus, the trial court could properly take into account the evidence related to the stabbing when selecting the appropriate sentence. "Nothing in the applicable statute or rules suggests that a trial court must ignore evidence related to the offense of which the defendant was convicted, merely because that evidence did not convince a jury that the defendant was guilty beyond a reasonable doubt of related offenses." (*Id.* at pp. 85-86.)

More recently, the California Supreme Court reaffirmed the validity of *Towne*, stating, "[A] trial court, in exercising its discretion in sentencing a defendant on an offense of which he or she has been convicted, may take into account the court's own factual findings with regard to the defendant's conduct related to an offense of which the defendant has been acquitted, so long as the trial court properly finds that the evidence

establishes such conduct by a preponderance of the evidence." (*In re Coley* (2012) 55 Cal.4th 524, 557.)

Disagreeing with this analysis, Ackerman cites *People v. Spencer* (1996) 51 Cal.App.4th 1208 (*Spencer*), where the appellate court concluded that a voluntary manslaughter verdict based on imperfect self-defense precluded the trial court from imposing an aggravated sentence based on the victim's vulnerability. (*Id.* at p. 1223.) However, the *Spencer* court observed there was a conflict in the case law regarding whether a trial court could make a sentencing decision in apparent conflict with a verdict because of the differing standards of proof—beyond a reasonable doubt for a verdict, and preponderance of the evidence for sentencing decisions. (*Ibid.*) The court in *Spencer* did not resolve that issue because there was no indication that the trial court made its own findings. (*Ibid.*)

Ackerman's reliance on *Spencer*, *supra*, 51 Cal.App.4th 1208 is unavailing. The conflict in the case law identified by the *Spencer* court was resolved 12 years later in *Towne*, *supra*, 44 Cal.4th at pages 85 to 89, which, as discussed *ante*, held that a trial court may base a sentencing decision on facts the jury implicitly found not to be established beyond a reasonable doubt.

In a related argument, Ackerman contends that the court abused its discretion in imposing the upper term because the jury's determined it is "not true" that he used a knife in the criminal threat. However, this argument fails because "[e]nhancement allegations must be proved beyond a reasonable doubt." (*People v. Lewis* (1991) 229 Cal.App.3d 259, 264 (*Lewis*).) Therefore, even when a jury finds a weapons enhancement not true,

the court may still find by a preponderance of the evidence that the defendant used a weapon as an aggravating circumstance. (*Ibid*.) For example, in *Lewis*, the People charged the defendant with several violent crimes, including rape, and the information alleged that the defendant used a dangerous weapon to facilitate his attack. Although the jury convicted the defendant of rape, it found the weapon allegation not true. (*Id.* at p. 262.) Nevertheless, the trial court imposed a full consecutive term for the rape, in part because the court found the defendant had been armed with a deadly weapon. (*Id.* at p. 263.) The Court of Appeal upheld the sentence, noting that although "[e]nhancement allegations must be proved beyond a reasonable doubt" (*id.* at p. 264), the "[c]ircumstances on which a trial court relies in making a sentencing choice must [only] be established by a preponderance of the evidence." (*Ibid.*) Similarly here, in sentencing Ackerman to the upper term, the court had discretion to consider that he made a surprise attack armed with a knife. (Rule 4.421(a)(8) [a factor in aggravation is that the "manner in which the crime was carried out indicates planning, sophistication, or professionalism"].)

IV. *REMAND IS APPROPRIATE UNDER SENATE BILL NO. 1393*

Ackerman's prison sentence included a five-year section 667, subdivision (a) enhancement. Ackerman contends that as a result of Senate Bill No. 1393, which became effective in 2019, we should remand this matter so that the trial court can exercise its discretion in determining whether to strike this enhancement. The Attorney General concedes this argument is well-founded. We agree and will remand to permit the trial court to exercise its discretion under section 1385, subdivisions (a) and (c), as to

Ackerman's section 667, subdivision (a) enhancement. We express no opinion as to how the trial court should exercise that discretion. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.)

DISPOSITION

The judgment on count 2 is reversed. The matter is remanded to allow the trial court to exercise its discretion in determining whether or not to impose the five-year enhancement under Penal Code sections 667, subdivision (a)(1) and 1385, as amended effective January 1, 2019. In all other respects, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment consistent with this opinion and its determination on remand with respect to the five-year enhancement, and to forward a copy to the Department of Corrections and Rehabilitation.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

AARON, J.